

# GST administration – a practitioner’s perspective

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## ***Abstract***

In this article, the author examines the administration of GST from a practitioner’s perspective, and discusses audits, refunds, rulings and disputes. The author concludes that Australia has a world-class GST administration: efforts to ensure compliance are succeeding; refunds and private rulings are mostly processed with efficiency; and the resolution of disputes through early engagement is working. However, it is also contended that the administration has become increasingly assertive over the last 20 years, and that the biggest threat to the administration of GST over the next 20 years is overreach.

**Key words:** GST; GST administration; GST audits; GST rulings; GST refunds; GST objections; GST appeals; GST disputes

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## 1. OVERVIEW

A GST practitioner may not be the best person to speak about GST administration, at least at the ‘whole of system’ level. GST practitioners are rarely concerned about the wider system when immersed in the day-to-day realities of practice. Senior practitioners in particular typically get involved in the most difficult of client issues in which disputes with the Commissioner are either on foot or are in reasonable contemplation. From this limited perspective the system for the most part seems difficult and confrontational; a far cry from the halcyon days following the implementation of GST when the Commissioner really was here to help.

Without wanting to diminish the role of GST practitioners, it is a sobering fact that most of what happens in the administration of GST happens without us. Looking at the ATO’s *GST Administration Annual Performance Report for 2017-18*,<sup>1</sup> one can see that 10.3 million original Activity Statements were processed for 2.75 million active GST registrants, and AUD 51.7 billion in GST refunds paid to taxpayers. This resulted in a net AUD 63.1 billion of GST cash being received. Of those 10.3 million Business Activity Statements (BASs) lodged, this author prepared only four, and they were for my own firm. So, the GST world really does turn without me, and without GST practitioners more generally.

These are impressive statistics but the ATO is more than a mere processing centre. It was the first administration globally to implement a model for the collection of GST on low value imported goods, and has implemented measures to tax digital imports. The ATO has also implemented measures to combat GST fraud in both the property and precious metals industries. These have all been successful measures; the term ‘successful’ is used here because, while practitioners can point to teething issues with each and every measure, in practice they have all broadly worked as intended. There is of course much more to the GST administration story than this but these are significant achievements.

It is safe to say that Australia has a world-class GST administration.

Beyond that description, this article has little to say about the ‘whole of system’ administration of GST. The article will look instead at the limited world of compliance, refunds, rulings and disputes, for this is where ‘policy meets reality’ for the practitioner.

## 2. COMPLIANCE

To a GST practitioner, the ATO’s compliance activities usually result in a world of pain for both clients and practitioners, though the practitioner is at least remunerated for the pain. Just how much financial pain is extracted from clients is shown in Table 1.

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<sup>1</sup> Australian Taxation Office (ATO), *GST Administration Annual Performance Report 2017-18* (18 March 2019), <https://www.ato.gov.au/about-ato/commitments-and-reporting/in-detail/gst-administration/gst-administration-annual-performance-report-2017-18/>.

**Table 1: GST Compliance Liabilities<sup>2</sup>**

| Year        | GST compliance liabilities |
|-------------|----------------------------|
|             |                            |
| 2013 - 2014 | \$3.4b                     |
| 2014 - 2015 | \$2.6b                     |
| 2015 - 2016 | \$3.3b                     |
| 2016 - 2017 | \$2.9b                     |
| 2017 - 2018 | \$3.0b                     |

These liabilities are primary GST liabilities arising from non-compliance and do not include any penalties or interest. This information yields at least two conclusions. First, the liabilities increase or decrease significantly year on year, reflecting the large revenue ‘outliers’ which might arise in any given year. Second, the GST liabilities remain substantial in each year reflecting a level of non-compliance which is unacceptable and which needs to be constantly monitored and addressed.

It is perhaps for this reason that the government recently announced that it would extend the current GST compliance program for a further four years. It will provide AUD 467 million to the ATO over four years from 2019-20, and is expected to deliver an additional AUD 2.3 billion in revenue to the States and Territories over the forward estimates period.<sup>3</sup>

The author’s own practice mainly advises large corporate clients. There have been significant changes in this market segment over the last decade that have had an impact on GST compliance.

First, the global financial crisis saw a major focus on cost-cutting which often led to a dramatic reduction in the size of tax teams. The size of the tax team continues to be historically low and this has an obvious impact on the time that can be invested in managing GST compliance. It is usually a struggle just to respond to day-to-day compliance responsibilities, let alone stepping back and reviewing the broader GST function.

Second, and as part of the cost-cutting, many corporates sent a range of ‘back of house’ functions, such as information technology (IT) and accounting, to offshore centres. This has at times made it difficult for those responsible for tax in Australia to meaningfully review what happens in another country.

Third, and also as part of the cost-cutting, many corporates outsourced these ‘back of house’ functions as well as offshoring them. This has at times compounded the difficulties.

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<sup>2</sup> Australian Taxation Office, *GST Administration Annual Performance Report 2013-14* (2015); Australian Taxation Office, *GST Administration Annual Performance Report 2014-15* (2016); Australian Taxation Office, *GST Administration Annual Performance Report 2015-16* (2017); Australian Taxation Office, *GST Administration Annual Performance Report 2016-17* (2018); Australian Taxation Office, *GST Administration Annual Performance Report 2017-18*, above n 1 (GST Performance Reports).

<sup>3</sup> Australian Treasury, *Mid-Year Economic and Fiscal Outlook 2018-19* (17 December 2018) 122, [https://archive.budget.gov.au/2018-19/myefo/myefo\\_2018-19.pdf](https://archive.budget.gov.au/2018-19/myefo/myefo_2018-19.pdf).

Fourth, there is an increase in the automation of repetitive processes. On paper this is a good thing, but it can be a double-edged sword. In the author's experience, the complexity of the implementation process itself has tended to magnify error rather than eliminate it. With vigilance, that should diminish over time, but there is often a false sense of security with automation which weighs against this.

Many larger corporates now have fewer people in tax teams (and related accounting and compliance teams), dealing with offshore and outsourced functions, in an increasingly automated environment. It might have been possible to get away with this if a taxpayer was dealing with a GST compliance audit ten years ago but times have changed.

The GST audit of ten years ago was a happily superficial experience for many corporates. It was mainly characterised by lengthy PowerPoint presentations. These showed the corporate structure, the BAS preparation process, the policies and procedures in place and the overall history of good governance. One or two difficult questions were handled out of session and many good cups of coffee were consumed. Interrogation of systems was rudimentary. The superficial nature of the audit acted to breed complacency among some corporates.

The GST review of today can be a vastly different experience. The ATO is now more willing to take a deep dive into the systems and accounts of a large corporate in conducting a review, and it is anything but superficial. From a 'whole of system' perspective this is a welcome development. For the individual corporate it is a painful process. Beverages stronger than coffee are increasingly consumed. But the time for complacency is over and tax teams need to be better resourced and equipped for today's tax compliance environment.

It should also be noted that the taxpayer experience for GST reviews varies dramatically. The main variable in this seems to be which compliance officer or team is assigned to the matter. While in one sense all GST reviews are unhappy experiences, the better the compliance officer the better the experience. The challenge for the Commissioner is to achieve a consistent experience across all reviews. There is a wide spectrum covering technical ability, commercial knowledge, and the ability to gather relevant evidence efficiently. The better compliance officers tend to sit at the one end of the spectrum on each measure.

Twenty years into the GST, the ATO's compliance program is in good shape. Yet this author is convinced that the Commissioner could achieve greater revenue with the same number of compliance officers, and with less pain for taxpayers, if there was an increase in investment in the training given. At the very least, it would improve the consistency of the taxpayer experience.

### **3. REFUNDS**

There is little that makes the heart beat faster for a GST practitioner than to secure a GST refund for a client. Perhaps a compliance officer has the same feeling on raising an assessment but refunds always excite the imagination of practitioners. Clients like them too, even more than income tax refunds. This is because GST refunds are 'above the line' in an accounting sense and are therefore reflected in the year's profit.

It is therefore unsurprising that since the implementation of GST there have been a number of cases dealing with GST refunds and, as a consequence, numerous law

changes.<sup>4</sup> Of course, GST refunds can arise from either under-claimed input tax credits or overpaid ‘output’ GST. But there is a significant difference in policy between the two. In broad terms, an under-claimed input tax credit usually involves a loss suffered by the relevant enterprise, while overpaid ‘output’ GST may either be suffered by the enterprise or have been shifted forward in price and so suffered by the enterprise’s customer. In the latter case, the refund rules are often written to prevent the enterprise receiving a ‘windfall gain’ at the expense of the customer.

Overlaid on these rules are limitation periods which generally prevent a refund being claimed beyond a four-year period, subject to rights of objection and appeal being exercised within the limitation period.

### 3.1 Refunds of GST output tax

In the early days of GST, the provision every party fought over was section 105-65(2) of Schedule 1 to the *Taxation Administration Act 1953* (Cth).<sup>5</sup> This provision was directed to restricting the payment of refunds of output GST. Where the Commissioner was not satisfied that the relevant conditions in the provision were met, then he ‘need not give you the refund’. This was interpreted as ‘need not, but may’ give the refund, a so-called residual discretion. The law and practice governing this provision and the exercise of the residual discretion was complex.

The boundaries of section 105-65 were judicially tested for the first time in *KAP Motors*.<sup>6</sup> It was a matter conducted on the basis of agreed facts which included that the taxpayer had overpaid GST under the mistaken belief that it had made taxable supplies. KAP Motors neither reimbursed nor undertook to reimburse its customers.<sup>7</sup>

The Commissioner contended that section 105-65(1) should be construed as though the word ‘supply’ included a purported or putative supply, such that it referred to any transaction that was incorrectly treated as a taxable supply.<sup>8</sup> He attached significance to the proposition that a refund of overpaid GST would ordinarily result in a windfall gain to the supplier. In response to that proposition, Emmett J stated:

Section 105-65 should not be given an expansive construction. While its object may be commendable, in seeking to avoid windfall gains for taxpayers, it is, in a sense, a paternalistic interference with the rights of taxpayers. It proceeds on the basis that GST that should not have been paid has been paid by a taxpayer. Its operation is to ensure that the Commissioner receives a windfall rather than a taxpayer.<sup>9</sup>

His Honour held that section 105-65 had no application in circumstances where there was no supply. Following that decision, the law was amended to extend the restriction

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<sup>4</sup> See generally Kevin O’Rourke, ‘GST Refunds’ (Paper presented at the Taxation Institute National GST Intensive, Melbourne, September 2011).

<sup>5</sup> *Taxation Administration Act 1953* (Cth), Sch 1, s 105-65(2)(b) (Administration Act).

<sup>6</sup> *KAP Motors Pty Ltd v Commissioner of Taxation* [2008] FCA 159; 68 ATR 927.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid* para 29.

<sup>9</sup> *Ibid* para 33 per Emmett J.

on refunds to situations in which tax was overpaid where there was no underlying supply.<sup>10</sup>

Further issues arose about the application of section 105-65 to supplies made using the margin scheme,<sup>11</sup> and to gambling supplies.<sup>12</sup> In broad terms, section 105-65 only applied if a supply was treated as a taxable supply ‘to any extent’ and the supply is not a taxable supply ‘to that extent’.

And then a jurisdictional issue arose. The Administrative Appeals Tribunal in *Naidoo* held that a decision made by the Commissioner under section 105-65 was not part of the assessment process and as such did not qualify for merits review under Part IVC of the Administration Act.<sup>13</sup>

These issues were finally resolved with the repeal of section 105-65 and the insertion of a new Division 142 into the GST Act with effect from June 2014. Merits reviews were reinstated, the ‘residual discretion’ discarded in favour of a self-assessing provision, and the concept of ‘excess GST’ solved problems involving margin calculations.

### 3.2 Time limitations on refunds

Also complex were the time limitation provisions. In relation to input tax credits, the attribution or timing rules operated in a manner that effectively permitted previously unclaimed input tax credits to be claimed in any subsequent tax period. In other words, indefinitely.<sup>14</sup> This was an intended outcome; an input tax credit was to be treated like cash and an enterprise was still entitled to its money if a tax invoice turned up after ten years.

In relation to output GST, the time limitation periods were unfathomable. In general, there was a four-year time limitation on claiming refunds of output GST. However, there was effectively no time limit on claiming a refund if there was a positive net amount for the tax period in which the overpayment occurred. In a paper delivered in 2006 the author concluded as follows:

There are sound public policy reasons for limitation periods which go to the finality of disputes or potential disputes, and to certainty of financial position. In the case of the Commonwealth, it is entirely reasonable that the books be ruled off after four years in the certain knowledge that no further refunds will be due. This policy intent, clear in the Explanatory Memorandum, has miscarried in the drafting of section 105-55 of the [Administration Act]. It is also inequitable that some taxpayers are limited to a four year refund period while others enjoy an unlimited refund period based around arbitrary criteria, such as whether they happened to have a positive net amount in the relevant

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<sup>10</sup> Administration Act, Sch 1, s105-65(2)(b).

<sup>11</sup> *A New Tax System (Goods and Services Tax) Act 1999* (Cth), Div 75 (GST Act).

<sup>12</sup> *Ibid*, Div 126; see also *International All Sports v Commissioner of Taxation* [2011] FCA 824; 81 ATR 607.

<sup>13</sup> *Naidoo v Commissioner of Taxation* [2013] AATA 443; 93 ATR 437.

<sup>14</sup> GST Act, s 29-10(4).

tax period. Section 105-55 should be amended to provide a four year time limit on claiming refunds in all circumstances.<sup>15</sup>

Five years later, in 2011, another paper of the author’s dealing with GST refunds at a similar conference opened with the following observation:

Five years ago at this conference I made a number of comments about GST refunds. Life seemed much simpler then; the Commissioner regularly paid refunds in respect of overpaid GST. That happy situation has changed dramatically. Why?<sup>16</sup>

In relation to the anomaly in the four-year limitation period, the author observed that ‘the authorities were painfully slow to act’.

In relation to limitation periods affecting output tax, the Treasurer announced changes only in May 2008. The commencement date was expressed to be 1 July 2008, thereby giving taxpayers several weeks to notify the Commissioner of any refunds which would extend back beyond four years.<sup>17</sup> Many refund claims were made in the weeks before 1 July 2008 with significant revenue implications.

In relation to limitation periods affecting input tax, a new Division 93 was inserted into the GST Act with effect from May 2009, and which now provides an effective four-year limitation on claims for previously unclaimed and unattributed input tax credits.<sup>18</sup> Some may say it is too effective; a fresh battleground has now emerged in the shape of draft ruling MT 2018/D1: time limits for claiming an input tax or fuel tax credit (‘the draft ruling’), released for comment late in November 2018.<sup>19</sup>

The Commissioner’s preliminary view is that the four-year time limit for claiming an input tax credit represents an absolute time limit even in circumstances where a taxpayer has lodged an objection or appeal against an assessment in relation to that credit within the four-year period. If the Commissioner’s view is correct it highlights a deficiency in the interaction of the self-assessment provisions and the refund limitation provisions. The poor interaction between the various pieces of legislation dealing with GST administration is a recurring theme.

Chartered Accountants Australia and New Zealand, a body which this author represents on indirect tax issues, has lodged a detailed submission with the Commissioner stating:

CAANZ strongly disagrees with the Commissioner’s preliminary view, which represents a radical departure from a straightforward policy in place for over 100 years – that limitation periods in federal tax statutes give way to an

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<sup>15</sup> Kevin O’Rourke, ‘GST Administration Issues’ (Paper presented at the Taxation Institute National GST Intensive, Melbourne, November 2006) 3.4.

<sup>16</sup> O’Rourke, ‘GST Refunds’, above n 4.

<sup>17</sup> *Tax Laws Amendment (2008 Measures No. 3) Act 2008* (Cth), Sch 2, sub-item 16(2).

<sup>18</sup> GST Act, Div 93.

<sup>19</sup> Australian Taxation Office, ‘Time Limits for Claiming an Input Tax or Fuel Tax Credit’, Draft Miscellaneous Taxation Ruling MT 2018/D1. While this draft ruling was withdrawn on 4 December 2019, the Commissioner has indicated that a further draft ruling will be issued in 2020: Australian Taxation Office, ‘Advice under Development’, available on the ATO website.

objection provided the objection is itself lodged within the relevant limitation period. The inability to have an independent review is inherently unfair.<sup>20</sup>

Despite the Commissioner’s view being ‘preliminary’ while he seeks comment, he has already raised the issue against taxpayers in current litigation.<sup>21</sup>

So, the notion that authorities might be ‘painfully slow to act’ when revenue is at risk is no longer a feature of the current administration of GST. Some might go so far as to say that the authorities can now be painfully quick to act, and perhaps painfully quick to over-react. This is increasingly so when revenue is merely ‘at stake’ rather than ‘at risk’.

### 3.3 Administration of GST refunds

Much of the Commissioner’s efforts on compliance discussed above relate to the verification of refunds made by taxpayers. The ATO’s ability to retain GST refunds for verification was considered by the Federal Court in the *Multiflex* litigation.<sup>22</sup> The Commissioner had retained Multiflex’s GST refunds while conducting a review into refunds that were suspected to be part of a fraudulent scheme. The Court decided that the ‘reasonable time’ referred to in section 35-5 of the GST Act is the period that the Commissioner takes to facilitate the payment of a GST refund and does not include the time taken to conduct an investigation into the accuracy of the claims. The Commissioner was ordered to pay the GST refunds before the audit was finalised. The law was quickly changed by introducing section 8AAZLGA of the Administration Act, which gives the Commissioner power to withhold refunds pending a verification check.

The Inspector-General of Taxation recently conducted a review of the ATO’s administration of GST Refunds and concluded as follows:

Overall, the IGT has found that the ATO’s administration of GST refunds operated efficiently with the vast majority of refunds released without being stopped for verification. Moreover, where refunds are stopped, the majority were processed and released within 14 or 28 days.<sup>23</sup>

The Inspector-General noted that, of the 2.4 million BASs lodged claiming GST refunds annually, the ATO’s case selection process stopped less than 1 per cent for verification, which represented less than 6 per cent of GST refund amounts claimed.<sup>24</sup> He also noted that the ATO’s automated risk assessment tools had been achieving a strike rate of only 26.7 per cent, which the ATO acknowledged to be no better than random selection for at least part of the risk assessment systems.<sup>25</sup>

The author’s own experience in assisting clients whose refunds have been withheld has been generally positive. Some matters have been escalated and, in my opinion, dealt with appropriately. As much as the withholding of refunds is an annoyance to

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<sup>20</sup> Ibid.

<sup>21</sup> The Commissioner’s view was rejected by Jagot J sitting as a Deputy President of the Administrative Appeals Tribunal in *Linfox v Commissioner of Taxation* [2019] AATA 222; 109 ATR 707 (22 February 2019); note that the author was involved in this matter for the applicant.

<sup>22</sup> See *Multiflex Pty Ltd v Commissioner of Taxation* (2011) 81 ATR 347 (Federal Court) and, on appeal, *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580 (Full Federal Court).

<sup>23</sup> Inspector-General of Taxation, *GST Refunds* (March 2018) vii, [https://cdn.tspace.gov.au/uploads/sites/16/2018/08/IGT-GST-Refunds-Final-Report\\_Redacted.pdf](https://cdn.tspace.gov.au/uploads/sites/16/2018/08/IGT-GST-Refunds-Final-Report_Redacted.pdf).

<sup>24</sup> Ibid 3.4.

<sup>25</sup> Ibid 3.57.

practitioners and their clients, this is an area of continuous improvement by the administration, which needs to balance timely refunds against fraudulent claims.

### 3.4 Interest on GST refunds

The availability of interest on GST refunds is currently contested. Perhaps more accurately, the time from which interest runs is contested. The Federal Court has recently held in *Travellex* that delayed refund interest was available to Travellex 14 days after its running account balance surplus arose (which was shortly after its original BAS was lodged in respect of the tax period to which the refund related).<sup>26</sup> Travellex established its entitlement to GST refunds in earlier proceedings that finished in the High Court.<sup>27</sup>

In simple terms, interest on a disputed GST refund is broadly available back to the original BAS rather than many years later when, on the Commissioner’s view, a relevant notification relating to the refund was lodged. The provisions are complex and the matter is on appeal.<sup>28</sup> It highlights again the poor interaction between different pieces of legislation governing GST administration.

Twenty years into the GST, the law and administration relating to refunds remains far too complex. That is especially undesirable given the importance of refunds in an invoice-credit multi-stage GST.

## 4. RULINGS

Not long after the introduction of GST the author was asked to deliver a paper on the topic: ‘The GST Rulings System – Is it Failing?’.<sup>29</sup> To pose the question two years rather than 20 years into the GST may have been a touch premature but the paper concluded then that the system was not failing. A number of suggestions for improvement were also made which were favourably received by the Commissioner.<sup>30</sup> The definition of a public ruling, for example, was drawn so widely that it might have extended to material on an ATO PowerPoint slide used at a conference presentation.

For the first decade of GST administration, the GST rulings regime was embodied in section 105-60 of Schedule 1 to the Administration Act (and its predecessor), which drew heavily from the earlier sales tax rulings system, rather than from the income tax rulings system.<sup>31</sup> This changed with effect from 1 July 2010 when the GST rulings regime was integrated into the general tax ruling regime, with some special rules applicable only to GST rulings. Further changes were made from 1 July 2012 to accommodate the incoming self-assessment regime for indirect taxes which replaced the so-called ‘self-actuating’ regime.

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<sup>26</sup> *Travellex Ltd v Commissioner of Taxation* [2018] FCA 1051, 108 ATR 278; note that the author has been acting for the applicant in the proceedings.

<sup>27</sup> *Travellex Ltd v Federal Commissioner of Taxation* [2010] HCA 33; 241 CLR 510.

<sup>28</sup> The Commissioner’s appeal to the Full Court of the Federal Court was unsuccessful: *Commissioner of Taxation v Travellex Ltd* [2020] FCAFC 10; though the High Court has now granted him special leave to appeal: [2020] HCATrans 089.

<sup>29</sup> Kevin O’Rourke, ‘The GST Rulings System – Is It Failing?’ (2002) 12(1) *Revenue Law Journal* 79.

<sup>30</sup> The recommendations were adopted by the Law Council of Australia and discussed at the National Tax Liaison Group meeting of 5 December 2002.

<sup>31</sup> Administration Act, Sch 1, s 105-60.

There are now common rules for public and private rulings in Division 357 of Schedule 1 to the Administration Act, while there are special rules for both public and private rulings in Divisions 358 and 359 respectively.<sup>32</sup>

In the case of private rulings, there are formal review rights for taxpayers to challenge an adverse ruling, though these are now for the most part redundant in a self-assessment environment. Paragraph 359-60(3)(a) of Schedule 1 to the Administration Act provides that a taxpayer cannot object against a private ruling if there is an assessment 'for the income year or other accounting period to which the ruling relates'.<sup>33</sup> This has implications for tax periods from 1 July 2012 as there will ordinarily be deemed assessments for each BAS lodged under the self-assessment regime. In such a case a taxpayer can only object against any assessments for the tax periods to which the private ruling relates.

There will still be occasions, however, where an objection against a private ruling can be made on the basis that it does not relate to an assessment. This will include private ruling applications on proposed future transactions and, perhaps curiously, private ruling applications lodged by taxpayers with outstanding BASs.

On the subject of curiosities, mention should be made of subsection 357-60(3) of Schedule 1 to the Administration Act.<sup>34</sup> This is a special rule which applies only to GST private rulings. It is essentially a deeming provision which provides that the GST payable on a supply is 'the amount worked out in accordance with a ruling' (if any) that relates to the GST payable on the supply and binds the Commissioner in relation to the supplier. In other words, the decision in a GST private ruling will override the substantive law. Pity the recipient of the supply who is thus bound, not by the substantive law, but by a ruling obtained by the supplier in which he or she played no part, and of which he or she may have no knowledge.

#### 4.1 Administration of private GST rulings

It is often the case in the early days of a GST implementation that there are numerous requests by taxpayers and their advisors for clarification of how the new law might apply to their circumstances. In Australia's case in the calendar year 2000, the Commissioner issued 89,779 private rulings across all taxes, of which 84,287 were GST private rulings. This was a staggering number and at the time the author wrote as follows:

While I have seen much criticism of ATO rulings, and of the introduction of GST generally, too little praise has been directed towards the Commissioner and his officers for an outstanding effort in even coping with the magnitude of the transition. Perhaps it is now time to do so.<sup>35</sup>

As might be expected, the number of GST private rulings has dropped dramatically, as Table 2 illustrates.

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<sup>32</sup> Ibid, Divs 357-359.

<sup>33</sup> Ibid, Sch 1, s 359-60(3)(a).

<sup>34</sup> Ibid, Sch 1, s 357(60)(3).

<sup>35</sup> O'Rourke, 'The GST Rulings System – Is It Failing?', above n 29, 88.

**Table 2: GST Private Rulings Finalised<sup>36</sup>**

| Year        | Private rulings finalised |
|-------------|---------------------------|
| 2000        | 84,287                    |
| 2013 - 2014 | 1,163                     |
| 2014 - 2015 | 927                       |
| 2015 - 2016 | 730                       |
| 2016 - 2017 | 748                       |
| 2017 - 2018 | 840                       |

The figures between 2000 and later years may not be strictly comparable as the Commissioner now also issues ‘guidance requests’ which, for example, numbered 5,492 in 2017-2018.<sup>37</sup> The Commissioner consistently finalises over 95 per cent of ruling requests within 28 calendar days of receiving all of the necessary information. Even though some practitioners may quibble over the necessity and timeliness of some requests for information, there is little doubt that the private rulings system is working reasonably efficiently.

There are of course benefits in applying for a private ruling which include: certainty of position (including for proposed transactions on assumed facts); mitigating the risk of underpaid tax, penalties and interest; and transparency with the Commissioner. However, there has been a tendency in recent times for the Commissioner to issue a ‘negative’ private ruling in favour of the revenue if there is even a slight doubt about the interpretation of a statutory provision. This has led advisers to recommend that clients not seek a private ruling unless it is considered essential to do so, such as with a major transaction. The author is not convinced that this is the best outcome for the GST system as a whole. Both the Commissioner and taxpayers would be better off with a higher level of engagement and, for the Commissioner at least, there is much to be gleaned from private ruling requests.

## 4.2 The changing nature of public GST rulings

In the case of public rulings, the Commissioner issued a number of very lengthy GST rulings on a comprehensive range of matters in the first few years of GST. It is an impressive and substantial body of work which has obviated the need for many taxpayers and their advisors to seek private rulings. Those early public rulings have succeeded in being helpful and informative to taxpayers and advisers. It was inevitable that such rulings could not continue to be published at the same rate, though there is a strong case to be made for maintaining them, as well as integrating them into a coherent body of work.

In more recent times, however, a different trend has emerged. In the last three years, GST public rulings (and draft rulings) have fallen into two categories, both few in number. First, there are those public rulings associated with new measures, essentially updating the ‘cross-border’ rulings for a modern era:<sup>38</sup>

<sup>36</sup> GST Performance Reports, above n 2.

<sup>37</sup> Australian Taxation Office, *GST Administration Annual Performance Report 2017-18*, above n 1.

<sup>38</sup> There also exist Law Companion Guidelines (LCGs) giving guidance on new legislative measures.

- GSTR 2017/1 – Goods and services tax: making cross-border supplies to Australian consumers;
- GSTR 2018/1 – Goods and services tax: supplies of real property connected with the indirect tax zone (Australia);
- GSTR 2018/2 – Goods and services tax: supplies of goods connected with the indirect tax zone (Australia).

The second and emerging category of public ruling is those which add further weapons to the armoury of the ATO:

- MT 2018/D1 – Time limits for claiming an input tax or fuel tax credit;
- GSTD 2018/D1 – Goods and services tax: determining the creditable purpose of acquisitions in a credit card issuing business.

The first of these draft rulings was discussed earlier, being the Commissioner's preliminary view that the four-year time limit for claiming an input tax credit represents an absolute time limit even in circumstances where a taxpayer has lodged an objection or appeal against an assessment in relation to that credit within the four-year period. The second of these draft rulings has emerged as a response to detailed audits of the credit card issuing businesses of major financial institutions.

Of course, there is nothing inherently wrong in the Commissioner publishing his views on a range of matters, and he should be encouraged to do so. However, there needs to be some balance and taxpayers should not feel as though public rulings are now just a means by which their rights and entitlements are diminished. The Commissioner would be well advised to consult on further suitable topics for GST rulings. Suggestions in the past have often been met with the response that the topic applies only to a narrow class of taxpayer. However, the credit card issuing businesses of major financial institutions is a fairly narrow class and this has not been a barrier to the issue of the draft ruling in this case.

Twenty years in to the GST, the rulings system continues to operate well, though improvements can and should be made.

## 5. DISPUTES

The provisions governing taxation objections and appeals are well known to practitioners and are contained in Part IVC of the Administration Act.<sup>39</sup> These provisions, or variations of them, have been in place in the federal tax system for over one hundred years.

Tax disputes are inevitable so the real debate is how the administration handles them. There has been a perception for some time that the ATO officers dealing with the objection or appeal were not sufficiently independent of the ATO officers originally dealing with the matter. In May 2015, in response to recommendations from the inquiry by the House of Representatives Standing Committee on Tax and Revenue into tax disputes, the ATO created a new business line, Review and Dispute Resolution (RDR). It is a kind of 'half-way' house of semi-independence and there are arguments both for

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<sup>39</sup> Administration Act, Pt IVC.

and against full independence. So, what does the evidence indicate about how the GST disputes system is working? Something of the system can be gleaned by looking at relevant figures for objections, litigation and settlements.

## 5.1 Objections

A taxation objection against an assessment or other appealable indirect tax decision is the formal document which initiates the dispute resolution process. Of course, that process may be engaged informally at any time but it is the taxation objection which crystallises a claim in a legal sense. The number of GST objections received and finalised over the last few years is set out in Table 3 below.

**Table 3: GST Objections<sup>40</sup>**

| Year        | Objections received | Objections finalised |
|-------------|---------------------|----------------------|
| 2013 - 2014 | 1353                | 1388                 |
| 2014 - 2015 | 1214                | 1381                 |
| 2015 - 2016 | 1150                | 1355                 |
| 2016 - 2017 | 859                 | 934                  |
| 2018 - 2019 | 842                 | 767                  |

It is clear from Table 3 that the number of objections is falling at a welcome rate. The most likely explanation for this is early engagement by the ATO in resolving the matter under objection.

## 5.2 Appeals to courts and tribunals

An objection which is not resolved to the satisfaction of the parties may well proceed by way of appeal to either the Administrative Appeals Tribunal or to the Federal Court of Australia. The number of GST appeals received and finalised over the last few years is set out in Table 4 below.

**Table 4: GST Appeals<sup>41</sup>**

| Year        | Appeals received | Appeals finalised |
|-------------|------------------|-------------------|
| 2013 - 2014 | 143              | 163               |
| 2014 - 2015 | 106              | 143               |
| 2015 - 2016 | 67               | 84                |
| 2016 - 2017 | 53               | 61                |

<sup>40</sup> GST Performance Reports, above n 2.

<sup>41</sup> Ibid.

There are two matters of note. First, a cursory comparison of the numbers of objections and appeals reveals that most objections are resolved without proceeding to appeal. Second, the number of appeals has fallen dramatically. Again, the most likely explanation for this is engagement by the ATO in resolving the matter.

It can also be gleaned from the ATO’s annual GST Administration Performance Reports that a significant proportion of cases (up to 50 per cent) deal with largely non-technical issues where taxable supplies are understated or input tax credits over-claimed. Another large proportion of cases (typically 15 to 20 per cent) deal with property matters. Outside of these categories, the remaining areas of dispute are relatively small. Another feature of the appeals is that most of the cases are from the micro and small to medium enterprises business market segments, rather than from the large business or government segments.

### 5.3 Settlements

The ATO may choose to settle a dispute where it considers settlement to be consistent with the good management of the tax system. In doing this, the ATO has to balance its responsibility to collect taxes with relevant factors such as the relative strength of the positions of both parties, the cost versus the benefits of continuing the dispute and the impact on future compliance for the particular taxpayer and the broader community. The number of GST cases settled over the last few years is set out in Table 5 below.

**Table 5: GST Settlements<sup>42</sup>**

| Year        | Cases settled | Original \$ liability | Settled \$ liability |
|-------------|---------------|-----------------------|----------------------|
|             |               |                       |                      |
| 2013 - 2014 | 32            | N/A                   | N/A                  |
| 2014 - 2015 | 77            |                       |                      |
| 2015 - 2016 | 49            | \$179m                | \$155m               |
| 2016 - 2017 | 75            | \$193m                | \$152m               |

Although it is difficult to fully reconcile the figures, there are again two matters of note. First, it is unsurprising that, as the number of objections and appeals are falling, the number of cases which settle are increasing. Second, a comparison of the original liability with the settled liability suggests that the Commissioner is not ‘giving away the furniture’ in settling matters.

### 5.4 Two classes of GST dispute

There may now be two classes of GST dispute.

The first class of dispute arises when the ATO takes the view that the matter is suitable for resolution. The impressive figures set out above clearly involve matters within this class. Some have suggested that this is simply the ‘low hanging fruit’ or the easy cases

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<sup>42</sup> Ibid.

involving no real technical issues. That would be churlish. The figures should simply be welcomed and the Commissioner congratulated.

The second class of dispute arises when the ATO takes the view that the matter is not suitable for resolution. For these disputes there is a perception among practitioners that the ATO has become unnecessarily confrontational in recent times and that it marks a low point in relations with the ATO. Of course, litigation and disputes more generally are by their nature adversarial. However, practitioners who have litigated over many years see a real change and a return to the 'win at all costs' mentality, with the Commissioner taking every point, many of which are procedural, rather than focus on the issue in dispute. That is unfortunate as many genuine disputes in this class remain capable of resolution without the need to be in a courtroom.

If it were possible for the author to offer some advice to the ATO it would be to take a much broader view of which matters might be suitable for a form of alternative dispute resolution. Absent fraud or evasion, it is the author's experience that almost every matter would benefit from intervention. One of the benefits of taking a broader view is that, even if a matter does not settle, it is often possible to narrow the points in dispute, whether technical points, procedural points or evidentiary matters. That benefits all parties. Further, the mere presence of an experienced facilitator with a mindset of resolving a dispute often tends, of itself, to bring about that result. All of this would go a long way to allaying the current concerns of practitioners.

## 6. CONCLUSION

Australia has a world-class GST administration both for the 'nuts and bolts' of processing BASs and for the 'bells and whistles' of world-first legislation. The efforts to ensure compliance are succeeding; refunds and private rulings are for the most part processed with efficiency; and the resolution of disputes through early engagement is working. Over the last 20 years, the ATO has become more confident and assertive.

However, the administration is increasingly muscular, and the biggest threat to the administration over the next 20 years is overreach. The recent tendency towards unfairly restricting refund claims; issuing 'negative' private rulings; issuing public rulings mainly for compliance; and a return to the 'win at all costs' mentality in litigation, all work against fostering a willing participation in the tax system.

Underpinning all of this is a legislative framework for GST administration which now resembles a patchwork quilt loosely knitted together by administrative fiat and litigation. That may well be a function of the way the provisions developed: limitations on claiming credits in 2008; a new rulings regime in 2010; a new self-assessment regime in 2012; and a new refunds regime in 2014. These provisions are overlaid on existing complex provisions in the GST Act and the Administration Act. It is an unsatisfactory state of affairs and when the provisions do not work well together the Commissioner now routinely resolves any difference against the taxpayer. These provisions are begging to be reformed into a coherent framework for GST.

Viewed from the perspective of a GST practitioner, these are the challenges in GST administration for the Commissioner and practitioners alike to resolve moving into the third decade of the GST.